No. 19-36020

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN DOE #1 *et al.*,

Plaintiffs-Appellees,

v.

DONALD TRUMP *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon

Brief of Plaintiffs-Appellees

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INTRODUCTION

Presidential Proclamation 9945 is an unlawful attempt to rewrite provisions of this country's immigration and healthcare laws by executive fiat. The Proclamation bars the entry of immigrants the President asserts will "financially burden" the healthcare system unless they plan to purchase what the Proclamation declares "approved" health insurance within 30 days of entry, or have the financial resources to pay for their "reasonably foreseeable healthcare costs." The Proclamation creates a single-factor health insurance test that overrides the multi-factor statutory test for determining who may be inadmissible on economic grounds. It also nullifies legislation that expressly extends assistance and coverage eligibility to newly-arrived immigrants so they can obtain comprehensive health insurance upon arrival. If implemented, the Proclamation would affect up to 60 percent of immigrants who meet all other requirements for lawful admission to the United States, and choke the flow of family-based immigration.

Neither the Constitution nor any statute authorizes this unprecedented and unilateral executive action. That is why the district court correctly concluded that Plaintiffs are likely to succeed on the merits of their claims.

Appellants challenge the district court's conclusion in three ways. They assert the Proclamation is not subject to judicial review, characterize it as an exercise of the President's "foreign relations" powers, and read the Supreme

Court's decision in *Trump* v. *Hawai'i*, 138 S. Ct. 2392 (2018), as blanket authorization for any executive action to exclude prospective immigrants.

Hawai'i itself debunks each of Appellants' theories. In *Hawai'i*, the Supreme Court reached the merits of a challenge to Presidential Proclamation 9645. That proclamation's stated purpose was to encourage specific countries to share information about their nationals so the United States could vet those individuals for national security purposes. The Court determined that Proclamation 9645 was connected to foreign affairs based on the Proclamation's express language and purpose. Even in that context, the Court approved the President's actions only after determining the proclamation's measures were supported by findings, consistent with existing laws, and within limits on executive power in the relevant sphere. Because the same analytical steps lead to a different outcome for the Proclamation in this case, the district court properly concluded Proclamation 9945 is unlawful under *Hawai'i*.

The district court's conclusions as to the remaining preliminary injunction factors are grounded in uncontroverted record evidence and established legal precedent. The district court neither erred in evaluating the evidence nor abused its discretion in crafting the injunction. The Court should preserve the status quo and let the preliminary injunction stand.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). Plaintiffs-Appellees filed the underlying action in the District of Oregon. The district court issued a preliminary injunction on November 26, 2019. ER 1-48. Defendants-Appellants filed a notice of appeal on December 4, 2019. ER 49-53.

ISSUES PRESENTED

A. Whether Appellants' challenged conduct is subject to judicial review.

B. Whether the district court properly enjoined Presidential Proclamation 9945 because Plaintiffs are likely to succeed on the merits, record evidence shows that Plaintiffs will be irreparably harmed absent an injunction, and the balance of hardships and public interest factors tip sharply in favor of Plaintiffs.

C. Whether the district court acted within its discretion in determining the scope of the preliminary injunction.

STATEMENT OF THE CASE

I. Background

A. The Immigration and Nationality Act

The Immigration and Nationality Act ("INA") established a comprehensive immigration system that prioritizes the admission of immediate relatives of U.S. citizens, including their spouses, parents, and children, by allowing an unlimited number of permanent immigrant visas to be issued to those individuals. 8 U.S.C. § 1151(b)(2)(A)(i); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir.

2005) ("The [INA] was intended to keep families together."); *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (explaining the "purpose of the Act [] is to prevent continued separation of families"). The statutory system also allows up to 675,000 other permanent immigrant visas for applicants with other family-based, employment-based, or diversity-based connections to the United States. *See* 8 U.S.C. § 1151(a). Family-based immigration accounts for approximately two-thirds of all permanent immigrant visas granted each year.[1]

To obtain a visa, applicants must demonstrate their eligibility for admission—*i.e.*, that none of the statutory "grounds of inadmissibility" bar their admission. *See* 8 U.S.C. § 1182(a); 8 U.S.C. § 1361(a). Congress legislated specific "grounds of inadmissibility" at Section 212 of the INA. 8 U.S.C. § 1182; *Arizona* v. *United States*, 567 U.S. 387, 395 (2012) ("Congress has specified categories of aliens who may not be admitted into the United States.") (citing 8 U.S.C. § 1182).

Section 212(a)(4)(B)(i) provides that prospective immigrants may be "inadmissible" for financial reasons if they are "likely to at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(B)(i). The statute requires that the "public charge" determination take into account "at a minimum" five distinct factors: (1)

[1] Congressional Research Service R43145, *U.S. Family-Based Immigration Policy* (Feb. 9 2018), Table A-5, CRS-31.

age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills. 8 U.S.C. § 1182(a)(4)(B)(i). No single factor is dispositive. Instead, the statute requires a totality-of-the-circumstances approach. *City & Cty. of S.F. v. U.S. Citizenship & Immigration Servs.*, 944 F.3d, 796 (9th Cir. 2019) ("If anything has been consistent, it is the idea that a totality-of-the-circumstances test governs public-charge determinations."). The Violence Against Women Act ("VAWA"), which amended the INA, expressly exempts qualifying noncitizen survivors of abuse and certain family members from the public charge test. 8 U.S.C. §§ 1154(a)(1)(A)(v), (a)(1)(B)(iv).

Section 212(f) delegates authority to the President to suspend "the entry of all aliens or any class of aliens as immigrants or nonimmigrants," if the President "finds that the entry of [those aliens or classes of aliens] into the United States would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). The Supreme Court has characterized Section 212(f) as broad in scope but has also assumed that it cannot be used to "override" other provisions of the INA. *See Hawai'i*, 138 S. Ct. at 2411.

B. The Affordable Care Act and Other Healthcare Laws

In the Affordable Care Act ("ACA") Congress expressly aimed to "reduc[e] the number of the uninsured," and decrease uncompensated care costs, which it calculated at $43 billion in 2008. 42 U.S.C. § 18091(2)(F). Congress attributed

uncompensated care costs in part to individuals insuring themselves with personal funds or with healthcare plans that provide inadequate coverage. *See id.* To address that problem, Congress took specific actions to increase the comprehensiveness and affordability of healthcare coverage. For example, it established exchanges to facilitate enrollment in plans that provide "essential health benefits"; prohibited discrimination in healthcare insurance based on pre-existing conditions and other factors; expanded and improved access to Medicaid; required most residents to maintain "minimum essential coverage" or pay a tax penalty; and provided financial assistance to residents, including recently-arrived immigrants, for enrolling in ACA-compliant comprehensive healthcare plans. *See generally* 42 U.S.C. §§ 300gg–300gg-5, 1396a, 18021 to 18024, 18031, 18116, 18071, 18091; 26 U.S.C. §§ 36B, 5000A. Uncompensated care costs have declined as a result. *See* SER 40-44, SER 108-164; ECF No. 71.[2]

The ACA and other healthcare laws codified congressional judgment that lawful immigrants should be eligible for certain forms of assistance to obtain comprehensive healthcare coverage upon arrival. *See* ER 313-15. Congress expressly provided that premium tax credits for ACA exchange plans "shall be allowed" for applicable taxpayers, 26 U.S.C. § 36B(a), who by "Special Rule"

[2] "ECF" numbers refer to the District of Oregon docket below.

include "alien[s] who [are] lawfully present in the United States" with household incomes up to 400 percent of the federal poverty line. 26 U.S.C. § 36B(c)(1)(B); *see also King v. Burwell*, 135 S. Ct. 2480, 2487 (2015) (describing premium tax credits as one of the ACA's "three major reforms" and emphasizing that they "shall be allowed" for any "applicable taxpayer").

Congress also addressed healthcare eligibility for noncitizens in the Public Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), the Children's Health Insurance Programs of 1997 ("CHIP"), and the CHIP Reauthorization Act of 2009 ("CHIPRA"). *See* ER 310-12; Under CHIPRA, Congress affirmatively provided federal dollars for states to fund Medicaid coverage for newly-arrived immigrant children up to age 21 and pregnant women during their first five years in the United States. *See id.*; 42 U.S.C. § 1396(v)(4)(A).

With these and other statutory provisions, Congress expressly legislated access to federal and state funds for newly-arrived immigrants to enroll in comprehensive health insurance plans.

C. Presidential Proclamation 9945

Presidential Proclamation 9945 ("The Proclamation") bars entry of prospective immigrants who satisfy all the INA's immigrant visa requirements but cannot prove to the satisfaction of a consular officer they will be covered by

"approved" health insurance within 30 days of entering the United States, or have the "financial resources" to pay for "reasonably foreseeable" medical costs. SER 282. Its stated purpose is to protect the country's "healthcare system" and "taxpayers" from the burden of "uncompensated care costs," and to alleviate the strain of those costs on "Federal and State government budgets." SER 281.

The Proclamation estimates the country's total uncompensated care costs at $35 billion per year. It does not provide a citation for that estimate or mention that $35 billion is significantly less than the cost of uncompensated care before Congress enacted the ACA. *Compare id.* with 42 U.S.C. § 18091(2)(F) ("The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008"). Nor does the Proclamation estimate the proportion of uncompensated care costs attributable to uninsured lawful new immigrants, who likely account for less than 0.06 percent of those costs. *See* SER 115-117 ¶¶ 17-18.

The Proclamation specifies the categories of "approved" health insurance plans that satisfy the President's new entry requirement. SER 282. These "approved" plans are not legally or practically available to most prospective immigrants or provide non-comprehensive healthcare coverage with exclusions for pre-existing conditions. ER 294-300. For example,

> **(1) Employer-sponsored plans** are difficult for immigrant visa applicants to secure because applicants are unlikely to have an offer of employment before arriving in the United States; also,

such plans often do not provide coverage until up to 90 days after their employment begins;[3]

(2) "Unsubsidized" plans available on the individual market within a state are difficult for many new immigrants to afford, which is why Congress provided assistance; prospective immigrants cannot access the individual markets from abroad and must first reside in a state to access the plans on a state's exchange;

(3) Short-Term Limited Duration Insurance (STLDI) plans effective for a minimum of 364 days are often unavailable to individuals outside the United States or those with pre-existing conditions;[4] half of all U.S. states do not offer STLDI plans with 364 days of coverage;[5]

(4) Catastrophic plans are non-comprehensive and, as defined in the ACA, are available only to individuals who are under the age of 30 before the beginning of the plan year (or who qualify for a hardship or affordability exception); also, they are available only to individuals living in the United States;[6]

(5) A family member's plan is usually an option only for spouses and children under 27 years old; enrollment period requirements

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[3] 42 U.S.C. § 300gg-7; *see also 2018 Employer Health Benefits Survey*, KAISER FAMILY FUND, (Oct. 3, 2018), https://wwww.kff.org/report-section /2018-employer-health-benefits-survey-section-3employeecoverage-eligibility-and-participation/ (noting that 71%of employers nationwide impose a waiting period and that the average waiting period is 1.9 months).

[4] *See, e.g.*, *Short Term Health Insurance Eligibility Information for Short Term Health Insurance, or STM*, ELIGIBILITY.COM (Jan. 28, 2019), https://eligibility.com/short-termhealth-insurance.

[5] *Is Short-term Health Insurance Right for You?*, HEALTHINSURANCE.ORG, https://www.healthinsurance.org/short-term-health-insurance/.

[6] 42 U.S.C. § 18022(e); 45 C.F.R. § 155.305(a)(3)(i) & (h); *Are You Eligible to Use the Marketplace?*, HEALTHCARE.GOV, https://www.healthcare.gov/quick-guide/eligibility/.

also create practical challenges to obtaining coverage "within 30 days" of arriving in the United States;[7]

(6) TRICARE plans and other U.S. military plans are available only to members of the U.S. military, their spouses, and children up to age 27;[8]

(7) Visitor health insurance plans "that provid[e] adequate coverage . . . for a minimum of 364 days" are typically not available to individuals who reside and intend to remain in the United States; many exclude coverage for certain categories of benefits (such as prescription drugs, maternity care, and pre-existing conditions), making it unclear whether they would "provid[e] adequate coverage," as that undefined phrase is used in the Proclamation; [9] and

(8) Medicare is available only to immigrants over 65 years of age who have been living continuously in the United States for five years.[10]

Coverage options and financial assistance that Congress expressly authorized for newly-arrived immigrants are excluded from the Proclamation's list of "approved" types of insurance. In particular, subsidized ACA-compliant plans and Medicaid

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7 *See Eligibility of Parents for a Group Health Plan*, INS. & FIN. SERVS., (Apr. 7, 2017), https://www.theabdteam.com/blog/eligibility-parents-group-health-plan/.

8 *See TRICARE Eligibility Check*, ELIGIBILITY.COM, https://eligibility.com/tricare.

9 *See, e.g., Visitors Medical Insurance–Pre-Existing Medical Conditions FAQ*, INSUBUY.COM, https://www.insubuy.com/visitor-medical-insurance-pre-existing-conditions/.

10 *See* 42 U.S.C. §§ 1395o, 1395i-2(a), 1395w-21(a)(3), and 1395w-101(a)(3)(A); *see also* SER 302.

do not meet the Proclamation's requirements even though they provide comprehensive healthcare insurance. *See* SER 282.

The Proclamation does not include any finding that uncompensated care costs will likely decrease if newly-arrived immigrants purchase what the Proclamation deems "approved" health insurance or self-insure with their own "financial resources," instead of using statutorily-authorized assistance for comprehensive care through subsidized ACA plans or Medicaid.

The Proclamation issued on October 4, 2019 with an effective date of November 3, 2019. SER 281. There is no record evidence any agency was involved before the President issued the Proclamation. SER 277-411. After the Proclamation issued, the State Department took action to implement it by the November 3 effective date. Among other things, the State Department announced the new "[r]equirement at visa interview" on its website. SER 1-3; ER 177-181; ER 287-91. It also issued an Emergency Notice of Information Collection on October 29, 2019 ("Emergency Notice") that was published in the Federal Register on October 30, 2019, with public comments due one day later. SER 64-66. The State Department received "over 300 comments" during that short window and conceded it could not respond to all of them before the "implementation deadline." SER 70-71. Nevertheless, the Office of Management and Budget ("OMB") approved the collection on November 1, 2019. *Id.*

Comments in response to the Emergency Notice identified numerous irrational aspects of the Proclamation. SER 4-63. Most of the "approved" insurance plans are not legally or practically available to the visa applicants the Proclamation targets. SER 234-235 ¶¶ 12-15, SER 212-213 ¶¶ 6-7, SER 177-178 ¶¶ 17-18, SER 227-229 ¶¶ 17-20, SER 219 ¶ 15, SER 037; ECF 1 ¶ 65; ECF 88 at 20-22. Other "approved" plans do not provide comprehensive care, and some "approved" plans are prohibited in many states because they can increase uncompensated care costs. SER 212-213 ¶¶ 4-7, SER 176-180 ¶¶ 11-23, SER 218-220 ¶¶ 10-16, SER 19-20; ECF 88 at 20-22. Commenters also expressed concern that prospective immigrants could be misled into purchasing inadequate or ineffective insurance. SER 8; *see also* SER 211-213 ¶¶ 3-7, SER 177-179 ¶¶ 17-22.

Appellants have since identified two websites they characterize as part of the "growing private marketplace" for the Proclamation's "approved" plans. Br. at 7. But plans on those websites specify that they are not intended for individuals who reside in the United States, and provide limited coverage with numerous exclusions, including for pre-existing conditions.[11] These limitations validate

[11] *See Diplomat American Insurance Policy Document* at 8-9, 15, https://www.visitorscoverage.com/policydoc/diplomat-america-insurance-policy-document.pdf; *Inbound Immigrant Insurance Policy Document* at 1, 12, https://www.visitorscoverage.com/policydoc/inbound-immigrant-insurance-policy-document.pdf; *Patriot America Plus Insurance Policy Document* at 15, 25, https://www.visitorscoverage.com/policydoc/patriot-america-plus-insurance-policy-document.pdf ; *see also Visitors Medical Insurance – Pre-Existing Medical*

commenters' concerns and illustrate that "approved" plans are not legally or practically available to most immigrants subject to the Proclamation.

II. Procedural History

A. Plaintiffs

Plaintiffs are individual U.S. citizens sponsoring immediate family members for immigrant visas; a foreign national whose immigrant visa application was pending when the Proclamation issued and just received his visa on January 28, 2020 during a rescheduled consular interview, ECF 123; and an organization whose work and mission have been materially disrupted by the Proclamation. ER 11-15; ER 279-282; SER 72-77, SER 83-107, SER 165-168, SER 188-209. The individual Plaintiffs seek lawful family reunification under the INA. ER 11-12. Plaintiff Latino Network seeks relief from the burden on its resources caused by the need to respond confusion and concern about the Proclamation among the population it serves. *Id.*; SER 192-205.

B. Proceedings Below

Plaintiffs, on behalf of themselves and all others similarly situated, filed this class action lawsuit on October 30, 2019, alleging that implementation of the Proclamation would be *ultra vires* and violate the Constitution's separation of

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Conditions FAQ, https://www.insubuy.com/visitor-medical-insurance-pre-existing-conditions/.

powers, the Due Process Clause, the Equal Protection Clause, and the Administrative Procedure Act. ER 363-369. On November 1, 2019, Plaintiffs filed a Motion for a Temporary Restraining Order, seeking to enjoin implementation of the Proclamation before its effective date. ER 226-70. On November 2, 2019, after a hearing at which both parties appeared, the district court granted Plaintiffs' motion, enjoining implementation of the Proclamation for a period of 28 days. ER 208-225.

Plaintiffs filed a motion for a preliminary injunction on November 8, 2019. ER 150-201. Defendants opposed the motion on November 15, 2019. ER 86-141. Plaintiffs filed their reply on November 19, 2019. SER 242-276. On November 26, 2019, after a hearing on Plaintiffs' motion, the district court issued an order "enjoining Defendants "from taking any action to implement or enforce Presidential Proclamation No. 9945, 'Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System.'" ER 48.

On November 8, 2019, Plaintiffs moved for class certification. ECF 44. Defendants responded on November 22, 2019. ECF 94. Plaintiffs replied on November 27, 2019. ECF 102. To allow Defendants time to conduct class discovery they contend is necessary for resolution of the motion, the district court

will take Plaintiffs' class certification motion under advisement on March 9, 2020. ECF 117.

On November 11, 2019, Plaintiffs filed a motion to compel production of the administrative record. ECF 68. Defendants initially stated that there was no administrative record and refused to produce a privilege log, ECF 76. After the district court granted Plaintiffs' motion, ECF 83, Defendants lodged a partial administrative record. ECF 91. They supplemented the administrative record and served a privilege log on January 10, 2020. SER 277-411. On January 24, 2020, Plaintiffs filed a motion to compel further production that is currently pending in the district court. ECF 119.

C. The District Court's Order Issuing the Preliminary Injunction

The district court granted Plaintiffs' motion for a preliminary injunction. ER 48. It concluded that Plaintiffs' claims are justiciable. ER 17-19. It also observed that past Supreme Court decisions involving Section 212(f) considered its use in the context of "foreign relations or national security," in which non-delegation concerns are "lessened." ER 25. The district court could not detect an "intelligible principle" that would apply in the "domestic context." ER 26. Next, the district court concluded that the Proclamation "supplants" the public charge provision because the Proclamation is "designed to stop immigrants from being a burden on taxpayers," which is "the purview of the public charge provision." ER 30. And,

because the Proclamation does not exempt certain victims of violent crimes and domestic violence, the district court held that it "contravenes and overrides § 1182(a)(4)(E)." ER 33. The district court expressed "no opinion" on conflicts between the Proclamation and other legislation, "as argued by Plaintiffs." ER 33. It held that Plaintiffs had shown "a likelihood of success on the merits" of their claim that the "Proclamation violates the Constitution's principle of separation of powers and is outside the scope of the President's authority" delegated to the President in Section 212(f). ER 35.

The district court also determined that Plaintiffs' evidence showed they were likely to suffer irreparable harm absent a preliminary injunction. ER 35-37. The court noted that Plaintiffs and putative class members could not afford, or would not be eligible, to purchase the Proclamation's "approved health insurance," and could not otherwise pay for their "reasonably foreseeable medical costs." ER 36. The district court also noted that many Plaintiffs and putative class members have provisional unlawful presence waivers, also known as I-601A waivers, for sponsored family members present in the United States who must travel overseas for consular interviews. ER 36. As the district court recognized, to obtain the waivers, the sponsoring family members already had to demonstrate they would suffer "extreme hardship" if separated from the visa applicant. *Id.* These waivers would be "automatically revoked" if a consular officer denied the applicant's visa.

Id. Finally, the district court found that Plaintiff Latino Network would likely suffer irreparable harm based on evidence that it would have to continue diverting significant financial resources to address the Proclamation's impact on the community it serves, preventing it from engaging in its core mission. ER 37.

The district court addressed the remaining preliminary injunction factors together, finding the balance of the equities and public interest factors both tipped sharply in favor of issuing a preliminary injunction. ER 37-42. The court observed that 21 states, the District of Columbia, and New York City had filed an *amicus* brief explaining the significant harm that states and governmental entities across the country would suffer if the Proclamation were to take effect. ER 38. Because the Proclamation steers immigrants to non-comprehensive insurance plans, the Proclamation would increase the risk of uncompensated care costs for state and local governments. ER 40. And "[t]he proliferation of non-ACA compliant plans may make it difficult or impossible for states to regulate such plans, increasing harm to consumers and the insurance market and resulting in greater uncompensated care and costs." *Id.* The district court held that the balance of the equities and the public interest "tips sharply in favor of Plaintiffs," particularly in light of the "significant evidence that allowing the Proclamation to go into immediate effect will have an irreparably harmful effect on Plaintiffs, putative class members, state and local governments, and *amici*." ER 42. For these reasons,

the district court enjoined Defendants "from taking any action to implement or enforce Presidential Proclamation No. 9945." ER 48.

The court rejected Defendants' request to limit the scope of the injunction to the named Plaintiffs only, explaining that its injunction was necessary to preserve the status quo and provide Plaintiffs and putative class members with appropriate relief. ER 46. Specifically, the district court noted the extensive record evidence of harm the Proclamation would cause to Plaintiffs, their families, 21 states, the District of Columbia, the City of New York, and putative class members. ER 46; *see also* ER 44.

D. Ninth Circuit Stay Proceedings

On December 4, 2019, Appellants filed their notice of appeal together with an Emergency Motion for an Administrative Stay and an Urgent Motion for a Stay Pending Appeal. Dkt. 2. On December 5, 2019, Plaintiffs filed a response in opposition to Appellants' Emergency Motion for an Administrative Stay, Dkt.9, and on December 16, 2019, Plaintiffs filed a response in opposition to Defendants' Urgent Motion for a Stay Pending Appeal. Dkt. 16. The motions panel issued a published order that denied Appellants' Emergency Motion; Judge Bress dissented. Dkt. 17. The majority denied the stay, noting that "the status quo would be disrupted by granting the temporary stay request." *Id.* In the same order, the motions panel expedited briefing and set oral argument on the Urgent Motion. *Id.*

On January 9, 2020, the motions panel heard argument on Appellants' motion for an administrative stay of the injunction pending appeal. Dkt. 28. A decision is pending.

SUMMARY OF ARGUMENT

Appellants cannot evade judicial review of the President's attempt to unilaterally rewrite provisions of the country's immigration and healthcare laws. Appellants' characterization of the Proclamation as an exercise of the executive's "foreign relations" power does not withstand scrutiny. Nor does Appellants' claim that Section 212(f) is an unlimited grant of exclusion power to the President. The Supreme Court's analysis in *Hawai'i* only confirms that the district court correctly reached the merits of Plaintiffs' claims and determined that implementation of the Proclamation would be unlawful. Construing Section 212(f) as broad enough to permit the Proclamation would raise grave non-delegation concerns.

Overwhelming and uncontroverted record evidence supports the district court's conclusion that implementation of the Proclamation would cause irreparable harm because Plaintiffs are at risk of indefinite separation from loved ones who likely cannot satisfy the Proclamation's requirements. The evidence also shows the balance of hardships and public interest factors tip sharply in Plaintiffs' favor because the Proclamation would steer new immigrants to healthcare plans that do not provide comprehensive coverage; this would likely increase

uncompensated care costs. The record also supports the district court's conclusion that the Proclamation would harm putative class members, state and local governments, and state health exchanges. Appellants did not submit any evidence to the contrary.

The district court did not abuse its discretion when it determined the appropriate scope of the injunction. The record details harm that extends far beyond the named Plaintiffs and even beyond the putative class. Under similar circumstances, the Supreme Court has fashioned injunctive relief extending beyond the named plaintiffs to others similarly-situated. The district court expressly stated its willingness to revisit the scope of the injunction after deciding Plaintiffs' motion for class certification. It also set a discovery and briefing schedule that will expedite its decision. Appellants' abstract arguments for a narrower injunction disregard the particular circumstances of this case and the ample authority supporting broad injunctive relief for broad unconstitutional action. The scope of the injunction is warranted and the district court did not abuse its discretion to fashion preliminary relief for the short period of time until it issues an order on class certification.

STANDARD OF REVIEW

This Court reviews "the district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Hernandez v. Sessions*, 872 F.3d

976, 987 (9th Cir. 2017) (internal quotation marks omitted). The Court reviews de novo the district court's legal conclusions, and reviews "the factual findings underlying its decision for clear error." *Id.* (internal quotation marks omitted). The Court reviews "the injunction's scope for abuse of discretion." *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 969 (9th Cir. 2015) (internal quotation marks omitted); *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012) (under abuse of discretion standard the appellate court may "reverse 'only when'" it is "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances") (quoting *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000)).

ARGUMENT

I. Appellants Cannot Evade Judicial Review

A fundamental duty of the Court is to enjoin "violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015), and to intervene when "the President [has] act[ed] in contravention of the will of Congress." *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring)). That duty has long included an obligation to review executive

action in the form of proclamations and executive orders.[12] "Executive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation . . . and if that authority is exceeded it is open to judicial review." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983).

Although "[t]he executive has broad discretion over the admission and exclusion of aliens, [] that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd sub nom. Reagan v. Abourezk*, 484 U.S. 1 (1987). It is therefore the Court's "duty" to determine "where those statutory and constitutional boundaries lie." *Id.*

Consistent with that duty, the Supreme Court has reached the merits of challenges to executive action under Section 212(f). *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 160 (1993) (reviewing challenge to President's use of Section 212(f) to "suspend[] the entry of undocumented aliens from the high seas"); *Hawai'i*, 138 S. Ct. at 2407-08 (reviewing challenge to President's use of

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[12] *See, e.g.*, *Youngstown*, 343 U.S. at 583, 589 (approving injunction to prevent Secretary of Commerce from enforcing an executive order); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (striking down an executive order on oil shipments); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (approving injunction to prevent enforcement of an executive order); *see also United States v. Lee*, 106 U.S. 196, 220 (1882) (noting even "highest" government officers are "bound to obey" law).

Section 212(f) to suspend entry of nationals from six countries); *see also* *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) (declining the government's request for a "broad decision that Congress [had] delegated" to the President "sole and unfettered discretion" and instead finding that Congress had "delegated [a] conditional exercise of [its] power"). This Court should do the same.

Appellants' contention that 6 U.S.C. § 236(f) precludes judicial review is meritless. That provision applies solely to the "decision of a consular officer" to grant or deny "a visa" in a particular case. *Id.* It does not bar courts from reviewing broad executive immigration policies, as distinct from individual visa decisions. *Compare Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1018-19 (N.D. Cal. 2019) (challenges to "systemic practices with respect to [Proclamation No. 9645's] waiver program . . . do not require review of an individual consular officer's decision") *with Yavari v. Pompeo*, No. 2:19-cv-02524-SVW-JC, slip op. at 3, 13 (C.D. Cal. Oct. 10, 2019) (distinguishing plaintiffs' mandamus-based claims "contesting the lack of any decision" on their visa applications from the policy-based challenge in *Emami* "contes[ing] the entirety of the government's waiver program rather than any individual decision or indecision"). Appellants' authorities

addressing individual consular decisions as opposed to broad executive action are therefore inapposite.[13]

Appellants' reliance on *Fiallo* is also misplaced. Br. at 27. There, the Supreme Court evaluated whether certain provisions of the INA were unconstitutional because they failed to give preferential status to the relationship between "illegitimate children" and their natural fathers. *Fiallo v.Bell*, 430 U.S. 787 (1977). The Court did not consider that issue unreviewable. Instead, it "underscore[d] the limited scope of judicial inquiry into immigration *legislation*," noting the Court had "repeatedly emphasized that 'over no conceivable subject is the *legislative* power of Congress more complete than it is over' the admission of aliens." *Id.* at 792 (emphases added) (citation omitted). To the extent the Court commented on "decisions made by the Congress *or the President*," it suggested a "narrow standard of review" might apply because immigration policy choices "*may* implicate our relations with foreign powers." *Id.* at 796 (emphasis added) (quoting *Matthews v. Diaz*, 426 U.S. 67, 81-82 (1976)). Nothing in *Fiallo* suggests

[13] Br. at 27, citing *Nishimura Eklu v. United States*, 142 U.S. 651, 660-62 (1892) (explaining the case "turn[s] on the validity and effect of the action of [the] inspector of immigration" at the port of San Francisco where he was "acting within powers expressly conferred by congress"); *Kleindienst*, 408 U.S. at 767 (addressing "implementation of [a] congressional mandate" in an "individual case"); *Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (explaining "a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise").

that executive action on immigration is inherently unreviewable, or that the scope of review is narrow in a case like this one that does not implicate this country's relationship with any foreign government.

Appellants cannot evade judicial review of Plaintiffs' claims under any theory they espouse, and the district court was correct to proceed to the merits of Plaintiffs' claims, just as the Supreme Court did in *Hawai'i* and *Sale*.

II. The District Court Properly Enjoined Implementation of the Proclamation

A. The District Court Correctly Concluded That Plaintiffs Are Likely to Succeed on the Merits of Their Claims

The Proclamation is unlawful because it "takes measures incompatible with the expressed or implied will of Congress" in the INA, the ACA, and other healthcare laws. *See Youngstown*, 343 U.S. at 637. Appellants cannot avoid constitutional constraints on the executive by characterizing the Proclamation as an exercise of the President's "foreign affairs" powers. Article I reserves to Congress the powers to make immigration law and spend taxpayer money for the public welfare. In the INA, the ACA, and other statutes, Congress exercised those powers to address the same domestic issues the Proclamation purports to address. The Proclamation is not a proper exercise of delegated authority under *Hawai'i.* Instead, the reasoning in *Hawai'i* confirms the Proclamation is unlawful.

1. The Proclamation is Unlawful Because It Overrides Legislation

The Proclamation overrides provisions of the INA, the ACA, and other laws by nullifying their effect and defeating their objectives. *See Abourezk*, 785 F.2d at 1057 (rejecting interpretation of one statutory provision that would have "nullified" another); *Arizona*, 567 U.S. at 399 (observing that an obstacle to the achievement of the "full purposes and objectives of Congress" creates a conflict with federal law). Because Congress has "covered" the same issues the Proclamation purports to address, the President's "different and inconsistent" approach to those issues violates the separation of powers. *Youngstown*, 343 U.S. at 639.

(a) The Proclamation Overrides Provisions of the INA

In the INA, Congress established a multi-factor test for prospective immigrants who will so financially burden the United States that they should be deemed inadmissible. 8 U.S.C. § 1182(a)(4). This "public charge" provision mandates a financial burden determination that takes into account "at a minimum" the alien's "age; health; family status; assets, resources and financial status; education and skills." No one factor can be determinative. "[T]he idea that a totality-of-the-circumstances test" must apply has been consistent throughout the history of the American immigration system. *City & Cty. of S.F.*, 944 F.3d at 796. Section 212(a)(4) is thus not a "mere suggestion" but a "carefully described

limit[]" on when financial considerations rise to a "ground[] of inadmissibility." *See Gonzales* v. *Oregon*, 546 U.S. 243, 260-61 (2006).

The Proclamation overrides this long-standing statutory test with a single-factor dispositive financial burden test based on healthcare coverage alone. The Proclamation would render inadmissible a broad swath of individuals who would pass the totality-of-the-circumstances statutory test, disrupting the "balance struck by Congress," *Arizona*, 567 U.S. at 400, in a comprehensive scheme designed to promote family unification. *Solis-Espinoza*, 401 F.3d at 1094; *Kaliski*, 620 F.2d at 217.

Section 212(a)(4) establishes that health and assets are factors to be considered within the totality-of-the-circumstances public charge test. This analysis has long encompassed consideration of the potential burdens immigrants might place on the healthcare system. A 1929 treatise the Administration cited in other cases specifically considered when "treatment in a public hospital" may justify deportation on public charge grounds. *See* Arthur Cook et al., *Immigration Laws of the United States*, at 142-43 (1929) (cited by Appellants in *Cook Cty. v. McAleenan*, No. 19-CV-06334 (N.D. Ill. Oct. 14, 2019), Dkt. No. 86). And in ongoing public charge litigation, the Administration has construed the receipt of Medicaid as a proper consideration under the existing public charge test. *See, e.g.*

Cook Cty. v. McAleenan, 2019 WL 5110267, at *2 (N.D. Ill. Oct. 14, 2019). Similarly, in an October 11, 2019 interim final rule, DOS specifically stated:

> In assessing the effect of the alien's health on a public charge determination, the interim final rule provides that the consular officer will consider evidence of health insurance or the ability to pay for reasonably foreseeable medical expenses in the United States a positive factor in the totality of the circumstances.

SER 317. Appellants cannot separate health insurance from the factors already considered under Section 212(a)(4) just for purposes of this litigation. As Appellants have recognized in other contexts, health and financial resources are already considerations under the statutory test; to comport with the INA, they must be considered as part of a totality-of-the-circumstances test and cannot be an independent ground for inadmissibility.

The interaction between the Proclamation and 8 U.S.C. § 1182(a)(4) is therefore nothing like the interaction between the proclamations and statutes Appellants cite. Br. at 41-42. In Appellants' examples, the proclamations and corresponding statutory provisions advanced similar objectives; they did not work at cross-purposes. *See id.* Here, the Proclamation's healthcare insurance test cannot be reconciled with long-standing congressional judgment about the holistic way to assess admissibility for immigrants who may financially burden the United States, or its judgment that the INA's purposes are served when only those who "are likely to become a public charge" are deemed inadmissible on economic grounds. *See*

Arizona, 567 U.S. at 406 (explaining "conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy") (citations and internal quotation marks omitted). The Proclamation also conflicts with VAWA's amendments to the INA, which explicitly exempt certain survivors of crime from any "financial burden" test. *See* 8 U.S.C. § 1154(a)(1)(A)(iii)-(vi).

The scale of the Proclamation's anticipated impact belies Appellants' claim that it merely supports existing law. Subjecting up to 60 percent[14] of otherwise qualified immigrants to the Proclamation's requirements is incompatible with measures Congress took in the INA to balance financial considerations against other legislative objectives. *See Youngstown*, 343 U.S. at 637; *Arizona*, 567 U.S. at 2505. The Proclamation not only upsets the balance Congress struck, it "stands as an obstacle," *Arizona*, 567 U.S. at 2505, to the accomplishment of the INA's statutory goal of "keep[ing] families together." *Solis-Espinoza*, 401 F.3d at 1094.[15]

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[14] This estimate reflects the proportion of applicants who would have to overcome the impossibly high new hurdle for admission and not the proportion of applicants who would actually incur uncompensated care costs if admitted, as Appellants seem to suggest. *Compare, e.g.*, SER 108-121 *with* Br. at 53 (suggesting that the number of people affected by the Proclamation is an indication of "harm" they would cause).

[15] *See also* The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.").

(b) The Proclamation Overrides Provisions of the ACA and Other Healthcare Laws[16]

In the ACA and other healthcare laws, Congress addressed the problem of uncompensated care costs. In the ACA, Congress specifically found that self-insurance and underinsurance in the population as a whole exacerbated the problem, and determined that improving access to subsidized and comprehensive coverage would reduce uncompensated care costs. *See* 42 U.S.C. § 18091. Consistent with that determination, Congress took various steps to make quality healthcare coverage more affordable to more people. Among other things, it expressly provided for premium tax credits to immigrants in a "Special Rule for those Lawfully Present in the United States." 26 U.S.C. § 36B(c)(1)(B)(ii). Congress specifically chose to provide this and other forms of assistance to lawful immigrants as soon as they arrive in the United States so they can afford comprehensive healthcare insurance.

The Proclamation overrides this deliberate approach. It denies entry to immigrants who would use the assistance Congress provided for comprehensive coverage. It requires new immigrants to reject benefits Congress expressly

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[16] The district court did not reach this issue but the Court can affirm on any basis in the record, *Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011), including the grounds supporting this claim and Plaintiffs' APA and Due Process claims. *See, e.g.*, ER 162-163, 178-192; SER 254-255; ER 310-16; SER 254-255.

intended for them to have, steers them toward self-insurance or underinsurance with non-comprehensive plans, and effectively vetoes Congressional spending decisions codified in the healthcare and tax laws. *See Clinton v. City of N.Y.*, 524 U.S. 417, 438 (1998); *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1233 (9th Cir. 2018) (withholding of federal funds appropriated by Congress in order to advance the executive's policy goals violates the separation of powers).

The Proclamation also conflicts with Congressional will expressed in CHIPRA. In that statute, Congress authorized states to provide Medicaid coverage for new immigrant children up to age 21, and pregnant women who are lawfully in the United States, without the five-year delay for Medicaid eligibility that applies to other immigrants. 42 U.S.C. 1396b(v). Congress also provided matching funds for states that expanded Medicaid coverage for immigrants under CHIPRA. The Proclamation effectively nullifies this congressional authorization and funding for the states by barring any immigrant above age 18 who would plan to obtain health insurance coverage through Medicaid. *See City & Cty. of S.F.*, 897 F.3d at 1232 (finding a separation of powers violation because President's policy impeded disbursement of appropriated funds to the state).

Because the Proclamation conflicts with the express and implied will of Congress within a purely domestic sphere. Plaintiffs are likely to succeed in showing that implementation of the Proclamation would violate separation of

powers principles. *See Youngstown*, 343 U.S. at 639 (J. Jackson concurring) (finding executive action unlawful when Congress had not left "an open field" and the President's actions were "inconsistent" with existing "statutory policies"); *Reich*, 74 F.3d at1333 (rejecting contention that a delegation of authority in a statute "designed to address broad concerns" could permit the President to alter the operation of a statute that addressed a "more focused question").

2. The Proclamation Is Not a Lawful Exercise of Any "Foreign Affairs" Power

To justify the President's invasion into an occupied legislative sphere, Appellants attempt to conjure a constitutional basis for his actions. They characterize the Proclamation as "fitting squarely within the President's foreign affairs powers." Br. at 37. But that characterization conflicts with the plain language of the Proclamation itself. By its terms, the Proclamation addresses uncompensated healthcare costs in the United States and the "financial[] burden" of those costs on American taxpayers. SER 281-282. It specifies insurance plans that the President unilaterally "approved" to cover newly-arrived immigrants in the United States. SER 282. It aims to reduce an alleged strain on "Federal and State [] budgets." *Id.* None of its provisions are directed toward any matter external to the United States.

The Proclamation says nothing about how it pertains to foreign affairs. It thus stands in stark contrast to the executive actions Appellants cite, each of which

related to foreign affairs on its face. Br. at 38, citing Proclamation No. 4865, 46 Fed. Reg. 48,107 (Oct. 1, 1981) (addressing "international cooperation" to intercept "vessels trafficking in illegal migrants" and "discussions with the Governments of affected foreign countries"); Proclamation No. 8342, 74 Fed. Reg. 4093 (Jan. 22, 2009) (implementing an act of Congress that "reflects international antitrafficking standards" to eradicate trafficking "around the world"); Proclamation No. 8697, 76 Fed. Reg. 49,275 (Aug. 4, 2011) (addressing the "prevention of atrocities internationally" and aiming to "prevent humanitarian crises around the globe"); Exec. Order No. 12807, 57 Fed. Reg. 23,133 (May 24, 1992) (directing the Secretary of State to enter into "cooperative arrangements with appropriate foreign governments" in connection with repatriation interdicted aliens); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (referring to "ongoing efforts to engage [certain] countries willing to cooperate, improve information-sharing and identity-management protocols").

Appellants' cases illustrate that past executive actions to exclude aliens have been expressly connected to foreign affairs. *See Hawai'i*, 138 S. Ct. at 2405 (addressing executive action to "elicit improved identity-management and information-sharing protocols and practices from foreign governments") (internal citations omitted); *Sale*, 509 U.S. at 168-69 (addressing executive action requiring repatriation of Haitians interdicted by the Coast Guard on the high seas); *U.S. ex*

rel. Knauff v. Shaughnessy, 338 U.S. 537, 544-45 (1950) (addressing executive action pursuant to statute permitting the exercise of exclusion authority "only when the United States is at war or during the existence of the national emergency proclaimed May 27, 1941"). There is no comparable foreign affairs connection here.

Appellants rely on *Curtiss-Wright* for the proposition that the President has broad foreign affair powers but the Proclamation does not fall within the "category of foreign affairs" that case describes. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936). In *Curtiss-Wright*, the Court considered an indictment against the Curtiss-Wright Corporation for conspiracy to sell arms to a foreign government in violation of a proclamation President Roosevelt issued pursuant to a joint resolution prohibiting weapons sales to countries "engaged in armed conflict in the Chaco." *Id.* at 312-14. The Court was explicit that the case involved an exercise of executive power in the "external realm," where the President speaks as "a representative of the nation" and "manages our concerns with foreign nations." *Id.* at 319. The executive's action pursuant to the joint resolution fell "within the category of foreign affairs" because its "exclusive aim" was to provide a "remedy for a hurtful condition within foreign territory." *Id.* at 315. Here, Proclamation 9945 only addresses conditions in the United States and

has no connection to circumstances in any other country; it does not fall within the "category of foreign affairs" described in *Curtiss-Wright*.

Zivotofksy does not help Appellants either. In that case, the Court recognized the President's authority to "determine[] what nations to formally recognize as legitimate" but explicitly rejected the executive's suggestion that it has "broad, undefined powers over foreign affairs." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089-90 (2015). Although Courts have inferred that the President might have some power to exclude aliens attendant to his foreign affairs functions, that is an exception to the constitutional rule reserving lawmaking power and control over the "formulation" of immigration policy "exclusively to Congress." *Galvan* v. *Press*, 347 U.S. 522, 531 (1954). That exception cannot stretch as far as Appellants contend without swallowing the rule.[17]

Instead, Appellants' authorities involve executive exclusion power that runs through the legislature. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (describing exclusion power conferred on the executive "through the

[17] For the same reason, this Court has recognized that the APA's "foreign affairs exception would become distended if applied to INS actions generally" and has construed the exception as applying when public rulemaking would "provoke definitely undesirable international consequences." *Yassini v Crosland*, 618 F.2d 1356, 1360 at n.4 (9th Cir. 1980). Appellants did not invoke the foreign affairs exception in its opposition to Plaintiffs' APA claim in the proceedings below. ER 86-149.

action of the legislative department" pursuant to the Geary Act of 1892); *Nishimura Ekiu*, 142 U.S. at 660-64 (concluding an executive officer had authority to detain an "alien immigrant" under the Immigration Act of 1891); *Knauff*, 338 U.S. at 544-45 (addressing executive action pursuant to statutorily delegated wartime emergency powers); *Sale*, 509 U.S. at 165 (addressing executive action pursuant to legislative authority delegated in Section 212(f); *Hawai'i*, 138 S. Ct. at 2407-08 (same).

In all events, the mere assertion that the President acted pursuant to his "foreign relations" power is not enough to show that the actions challenged in this case "stem" from the "Constitution itself." *Youngstown*, 343 U.S. at 585-87; *see Medellin v. Texas*, 552 U.S. 491, 524 (2008) (noting the invocation of foreign affairs powers "do not allow us to set aside first principles"); *Zivotovsky*, 135 S. Ct. at 2079 ("The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."). The Proclamation must be judged by its "text" and understood in terms of its "object and policy." *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005). Here, the text and purpose of the Proclamation establish that it concerns internal affairs ordinarily for the legislature, including commercial activity within the United States and the use of taxpayer money to provide for the general welfare. *See Curtiss-Wright*, 299 U.S. at 315;

Article I § 8. Therefore, the Proclamation is not a lawful exercise of any "foreign affairs" power.

3. The Proclamation Is Not a Lawful Exercise of Section 212(f)

Absent constitutional authority, Appellants argue that the Proclamation is a lawful exercise of power under Section 212(f), as the Supreme Court interpreted that provision in *Hawai'i*. But *Hawai'i* is not blanket approval for any invocation of Section 212(f). Instead, the *Hawai'i* Court took three analytical steps before concluding that Section 212(f) authorized the particular proclamation in that case. The Court analyzed whether the proclamation met the textual requirements of Section 212(f); squared with existing laws; and operated within limits on executive power in the relevant sphere. Those same steps confirm the Proclamation here is unlawful.

(a) The Proclamation Does Not Comport with the Text of Section 212(f)

The Court's analysis in *Hawai'i* began with the "textual limits" of Section 212(f), which require the President to "find" that entry of a class of aliens "would be detrimental to the interests of the United States," and provide some limit on the duration of the "suspension" imposed. 138 S. Ct. at 2408-10. Although the Court in *Hawai'i* found the proclamation in that case satisfied those basic textual requirements, the Proclamation here does not.

In *Hawai'i*, the Court explained that the President had instructed multiple agencies to perform a "comprehensive evaluation" of country-by-country security and visa issuance practices. *Id.* The Court described the proclamation in that case as "setting forth extensive findings" to support the President's conclusion that its measures would "protect national security and public safety, and [] induce improvement" in specific countries' vetting and information sharing practices." *Id.* at 2408-09. The Court in *Hawai'i* declined a more "searching inquiry" because "in the context of international affairs and national security" the Court will "grant weight to [the President's] conclusions." *Id.*

In contrast, the Proclamation here does not offer *any* findings about the prospective immigrants it targets or the entry conditions it imposes. Its assertions about the "uninsured" are not findings about the individuals whose entry the Proclamation bars because the Proclamation bars those who would have comprehensive insurance under a subsidized ACA plan or Medicaid. *See* SER 281. And the Proclamation does not include any finding that uncompensated care costs will decline if newly-arrived immigrants either self-insure with their own "financial resources" or purchase what the Proclamation deems "approved" health insurance. The conditions of entry it applies are wholly unsupported. And given the purely domestic nature of the purported findings here, there is no reason for the Court to presume the President's bare assertions satisfy the requirements of Section

212(f). *Cf. Hawai'i*, 138 S. Ct. at 2408-10; *see also Panama Ref.*, 293 U.S. at 431 (striking down an executive order in part for lack of findings connected to the stated rationale).

Appellants assert that "*Hawai'i* made clear that Plaintiffs cannot succeed on an attack on the sufficiency of findings in a Presidential Proclamation." Br. at 30. But that is not what *Hawai'i* said. Instead, the Court found the particular "attacks on the sufficiency of the findings" in *Hawai'i* could not be sustained in light of the thorough "agency evaluations, and recommendations" in that case. *Hawai'i*, 138 S. Ct. at 2409. And even with such extensive findings, the *Hawai'i* Court emphasized that it was "in the context of international affairs and national security" that the President could proceed without "conclusively link[ing] all the pieces of the puzzle." *Id*. Nothing in *Hawai'i* suggests the findings here are sufficient where the President is drawing on neither his own expertise in international affairs nor the expertise of any agency.

Instead, the findings are necessarily deficient because they do not rationally connect to the choices the President made. The Proclamation's text does not evince any relationship between what the Proclamation requires and its stated goals; it therefore cannot survive even under the most generous standard of review.[18] *See*

[18] Courts have not been clear about what standard presidential findings must satisfy to pass constitutional muster in a purely domestic context. But here, the Proclamation is so irrational that it cannot satisfy even the most generous standard

Panama Ref., 293 U.S. at 432 (allowing the President to act pursuant to delegated authority "without making any finding with respect to any object that he does select, and the circumstances properly related to that object" would be to "invest him with an uncontrolled legislative power").

Finally, the lack of findings about the targeted aliens renders the Proclamation inconsistent with the text of Section 212(f) because it is impossible to discern the "triggering conditions" that will end the "suspension" of aliens here. *Hawai'i*, 138 S. Ct. at 2410 (concluding that a proclamation may be limited in duration by the resolution of a "triggering condition" without a more definite end date); ER 31-32. In *Hawai'i*, government agencies articulated a "baseline" of information they needed from foreign governments to determine whether a prospective immigrant might "pose a security threat." *Id.* at 2404. The proclamation in that case expressly applied "until such time" as specific countries achieved that "baseline" for information sharing. But here, the Proclamation does not specify that it will remain in place only "until" any particular circumstances change. *Id.* at 2409. The lack of findings as to any acceptable "baseline" for uncompensated care costs in the United States means that it is impossible to

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and appears pretextual. ER182-92, 328-338; SER 259-260. Any attempt to implement the Proclamation would necessarily constitute arbitrary and capricious agency action. *See id.*; *see also* SER 108-164, SER-215-230.

determine either the triggering condition for the Proclamation or when that condition will be resolved. For this reason too, the Proclamation does not satisfy the basic textual requirements of Section 212(f).

(b) The Proclamation Contravenes Provisions of the INA and Healthcare Laws

After concluding that the proclamation in *Hawai'i* satisfied the plain text of Section 212(f), the Court proceeded to consider whether the particular exercise of delegated authority was consistent with other statutory provisions. *Id*. at 2409-10. And in other cases Appellants cite, courts similarly evaluated whether the executive actions in those cases were consistent with existing law. *See Sale*, 509 U.S. at 158, 160 (1993) (evaluating whether President's use of 212(f) power was consistent with the INA and the United States' treaty obligations); *Knauff*, 338 U.S. at 544-46 (evaluating whether a precursor to Section 212(f) was consistent with the War Brides Act). Here, the Proclamation is not consistent with existing law and the analysis in *Hawai'i* yields a different outcome.

In *Hawai'i*, the Court satisfied itself that the proclamation in that case did not override 8 U.S.C. § 1361 or 8 U.S.C. § 1187. 138 S. Ct. at 2410-12. But the interaction between the proclamation in *Hawai'i* and those two provisions is nothing like the interaction between the Proclamation here and the statutory provisions at issue in this case.

In 8 U.S.C. § 1361, the INA requires aliens to prove they are admissible. The proclamation in *Hawai'i* did not override that requirement because it did not nullify Congress's decision to place the burden of proving admissibility on the alien. In contrast, the Proclamation here does override the public charge provision because it nullifies Congress's decision that aliens should be deemed inadmissible for financial reasons only according to the holistic, multi-factor, totality-of-the-circumstances test required under Section 212(a)(4). *See Clinton*, 524 U.S. at 438.

In 8 U.S.C. § 1187, the INA authorizes visa waivers for nationals of countries that cooperate with the United States in information sharing. The proclamation in *Hawai'i* did not override that authorization because it did not impede access to visa waivers that Congress made available. 138 S. Ct. at 2411. But here, the ACA and other healthcare laws expressly authorize certain benefits and financial assistance to newly arrived immigrants for purchasing comprehensive healthcare coverage. The Proclamation overrides that Congressional authorization because it impedes immigrants' access to assistance Congress deliberately made available.

Congress has taken specific actions to address the very problems the Proclamation purports to address by including both health and assets within the public charge test, and by providing benefits and assistance to immigrants so that they can enroll in comprehensive healthcare plans that Congress determined are

key to reducing uncompensated care costs. Because the Proclamation overrides these efforts, it does not survive the same analysis the Court applied in *Hawai'i*.

(c) Congress Has Constrained Executive Power in the Relevant Sphere

In the final step of its statutory analysis, the *Hawai'i* Court found no indication that Congress intended to "constrain the President's power" within the same "sphere" as the proclamation in that case. 138 S. Ct. at 2409, 2414. Again, the same inquiry leads to a different conclusion here.

In *Hawai'i* the Court concluded that 8 U.S.C. § 1152(a)(1)(A) did not constrain the President's power to issue the proclamation in that case. Because Section 1152(a)(1)(A) pertains to "issuance of visas," the Court found no constraint on the President acting in a separate sphere pertaining to "grounds for inadmissibility" under Section 212. But here, both Section 212(a)(4) and Section 212(f) pertain to grounds for inadmissibility; Section 212(a)(4) articulates the specific test Congress mandated for determining which prospective immigrants will so financially burden the United States that they should be deemed inadmissible. Read in context, Section 212(f) grants residual power that applies to those "not covered by one of the categories" in Section 212(a); it cannot be used to nullify the more specific public charge provision. *Abourezk*, 785 F.2d at 1049 n.2 (Ginsburg, J.); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639,

645 (2012) (interpreting a statute according to the principle "that the specific governs the general").

The Proclamation also contravenes specific Congressional decisions in the healthcare sphere, where Congress addressed the problem of uncompensated care costs. The lack of any broad delegation of authority to the President in the ACA or other healthcare laws confirms that Congress constrained the President's power in the relevant sphere. *See Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp*., 529 U.S. 120, 121 (2000) (explaining "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand"); *Reich*, 74 F.3d at 1333 (finding the President could not use delegated power in one statute to override a statute addressing the "more focused question" at issue).

Appellants' suggestion that Section 212(f) permits the President to override congressional judgments codified in another statutory scheme that directly addresses uncompensated care costs does not comport with the "[c]ommon sense and historical practice" considerations that were relevant in *Hawai'i*, 138 S. Ct. at 2415. Nor would it be consistent with the "context" and "purpose" of the INA. *See Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019). Because the Proclamation in this case overrides what Congress has legislated in precisely the same spheres in

which the Proclamation purports to operate, Plaintiffs are likely to succeed on the merits of their separation of powers claim.

4. Appellants' Interpretation of Section 212(f) Raises Grave Constitutional Concerns

Appellants suggest the steps of the *Hawai'i* analysis were unnecessary because Section 212(f) places no constraints on the President's power to exclude prospective immigrants. *See* Br. at 28-30. But if Section 212(f) is such a broad delegation of authority, it constitutes a wholesale "[a]bdication" of legislative power to the President. *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). It would give the President discretion to rewrite immigration law unilaterally, with "literally no guidance for the exercise of [that] discretion." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

Appellants respond that the "non-delegation doctrine does not apply in the field of foreign affairs," Br. 33, but that is not what any of their cases hold. For example, Appellants rely heavily on cherry-picked language from *Curtiss-Wright* but ignore the context entirely. Br. at 33-35, 37. In that case, the President acted pursuant to a joint resolution that permitted the President to issue a proclamation only upon finding that the prohibition of arms sales to countries engaged in the Chaco conflict may "contribute to the reestablishment of peace," and only after consulting with "governments of other American Republics." 299 U.S. at 312.

President Roosevelt specifically acted "pursuant to authority conferred" by that joint resolution to prohibit arms sales to Bolivia and Paraguay. *Id.* at 311

Although the Court approved that use of delegated authority, the delegation provision was both narrower than Section 212(f) and expressly connected to foreign affairs. The Court's approval emphasized "the differences" between "external affairs" and "internal affairs." *Id.* at 315. It focused on the fact that the joint resolution and proclamation were intended to "remedy" harmful circumstances overseas. *Id.* And its holding was explicitly limited to the foreign affairs context: "[W]e conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the re-establishment of peace *in the affected countries* . . ." *Id.* (emphasis added). The reasoning in *Curtiss-Wright* suggests the delegation of authority in that case would *not* have been constitutional if it had delegated broad authority for the President to act in the context of "internal affairs," where his lawmaking power is "significantly limited." *Id.* at 319.

Knauff also approved of a delegation provision that was narrower than the modern Section 212(f) and expressly connected to foreign affairs. The delegation of authority in that case was limited to "the national emergency of World War II." 338 U.S. at 544. It authorized the President to impose "special restrictions on the entry of aliens *only* when the United States is at war or during the existence of the

national emergency proclaimed May 27, 1941." *Id.* at 544-45 (emphasis added). That provision did not present a non-delegation problem because it codified powers the executive already possessed under the Constitution, namely the power to prosecute a war. *See Id.*

When Congress removed the national emergency requirement from Section 212(f), it gave the President flexibility to respond to foreign affairs and national security matters absent a national emergency. *See Hawai'i*, 138 S. Ct. at 2412 (explaining that Section 212(f) borrowed "nearly verbatim" from a delegation of exclusion authority during wartime with "one critical alteration" that removed the "national emergency standard"). Appellants' suggestion that the removal of the national emergency clause gave the President unfettered authority to override congressional judgments in a purely domestic sphere has no support in the case law or the history of Section 212(f). *See Clinton*, 524 U.S. at 436 (requiring clear evidence before inferring that Congress chose to "[a]bdicat[e its] responsibility" in a manner that would violate the separation of powers); *see also Hawai'i*, 138 S. Ct. at 2413 (explaining that non-emergency entry suspensions historically "retaliate[d] for conduct" by foreign governments that "conflicted with U.S. foreign policy interests").

Like other broad immigration provisions, Section 212(f) cannot be read "in isolation and literally" to confer "unbounded authority." *United States* v.

Witkovich, 353 U.S. 194, 199 (1957); *Kent v. Duller*, 357 U.S. 116, 128 (1958) (rejecting contention that the President's authority to designate passport rules conferred "unbridled discretion" and reading the provision according to "prior administrative practice"); *see Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (same); *Haig v. Agee*, 453 U.S. 280, 297-98 (1981) (same). Instead, Section 212(f) is necessarily limited by the provision's text, purpose, history, statutory structure, and the Constitution itself. *See Zemel*, 381 U.S. at 17 (a broad delegation of legislative power "does not mean" that Congress "grant[s] the Executive totally unrestricted freedom of choice"); *Clinton*, 524 U.S. at 451 (Kennedy, J. concurring) (Congress cannot "surrender" its Article I powers).

None of Appellants' cases stands for the proposition that their expansive interpretation of Section 212(f) is constitutional. Instead, *Hawai'i* applied limiting principles by checking the adequacy of the President's findings, and assuming that Section 212(f) cannot "override" other statutory provisions or permit the President to exceed any "implicit bar" on his authority. 138 S. Ct. at 2411. If the Court applies those constitutionally-required limits to Section 212(f), and reads that provision in a manner consistent with the INA's structure, purpose, and history, Section 212(f) might stand but the Proclamation must fall.

B. The District Court Did Not Abuse Its Discretion in Finding That Plaintiffs Would Likely Suffer Irreparable Harm Absent an Injunction

The uncontroverted evidence refutes Appellants' claim that the district court relied on a "chain of hypotheticals" to reach its finding of irreparable harm. Br. at 46. All individual Plaintiffs are in bona-fide family relationships that allow them to sponsor or be sponsored by their loved ones for an immigrant visa. SER 72-77, SER 83-87, SER 92-107, SER 165-168, SER 188-191, SER 206-209, SER-238-241. They are all individuals of modest financial means; they either come from single-income households or rely on disability or social security payments as their primary source of income. *Id.* None can afford unsubsidized comprehensive coverage for themselves, much less their loved ones who must satisfy the Proclamation's requirements to receive their visas. *Id.*

The "approved" types of health insurance under the Proclamation are either legally impossible for newly arrived immigrants to obtain (e.g., Medicare), or are unavailable as a practical matter for most newly arrived immigrants, due to eligibility and enrollment limitations or other restrictions, such as exclusions for pre-existing conditions. *See* SER 173-187, SER 215-237. As the record demonstrates, several Plaintiffs have loved ones with serious chronic medical conditions, such as multiple sclerosis, leukemia, and lupus, which make it virtually impossible for them to enroll in any type of "approved" health insurance under the

Proclamation. *See* SER 72-77, SER 101-107, SER 238-241. The district court did not abuse its discretion in finding that the Proclamation would irreparably harm the individual Plaintiffs by separating them from family members who likely cannot satisfy the Proclamation's requirements. ER 36.

Appellants claim that the district court improperly assumed that two named Plaintiffs, whose loved ones sought to postpone interviews initially scheduled in the week after the Proclamation's effective date, would reschedule their interviews before a decision on the merits. Br. at 46. But the district court was correct as to both individuals. Plaintiff Soriano, who is Plaintiff Castellano's spouse, was interviewed on January 28, 2020 and his visa application was granted. ECF 123. The spouse of John Doe #1 is scheduled to have her interview on May 28, 2020. *Id.* The district court correctly concluded that both Plaintiffs would likely face irreparable harm if the Proclamation were not preliminarily enjoined.

Appellants offer only two substantive rebuttals to the district court's finding that the Proclamation will inflict irreparable harm on the individual Plaintiffs: that a post-hoc market has emerged "to provide insurance options in order to satisfy the Proclamation," Br. at 48; and that individuals have a year to seek reconsideration of their visa denial and any "delay" in visa processing is "reasonable." Br. at 48-50. Neither of these arguments contradict the district court's findings of irreparable harm.

First, the websites the government identifies as offering options to satisfy the Proclamation only confirm that "approved" health insurance plans are not only virtually unattainable, but also do not further the Proclamation's goals of reducing uncompensated care costs. Two of the three plans offered on www.visitorscoverage.com are unavailable to applicants intending to reside permanently in the United States.[19] The third is a fixed indemnity plan[20] that "is not a general health insurance policy but an interim travel medical program intended for use while away from your Home Country or Country of Residence."[21] All of the plans also specify coverage exclusions for pre-existing conditions.[22]

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[19] *Patriot America Plus Insurance Policy Document*, https://www.visitorscoverage.com/policydoc/patriot-america-plus-insurance-policy-document.pdf at page 15 ("In order to be eligible, a person must . . . not have established a permanent residency in the Destination Country."); *Diplomat American Insurance Policy Document*, https://www.visitorscoverage.com/policydoc/diplomat-america-insurance-policy-document.pdf at page 1 ("Applicant must reside outside of the United States.")

[20] A fixed indemnity plan is a type of insurance that pays a fixed dollar amount for every covered service, which can be well below the actual cost of service received, thus often leading to inadequate coverage. *See* SER 184-185.

[21] *Inbound Immigrant Insurance Policy Document*, https://www.visitorscoverage.com/policydoc/inbound-immigrant-insurance-policy-document.pdf, at page 15.

[22] *Patriot America Plus Insurance Policy Document*, https://www.visitorscoverage.com/policydoc/patriot-america-plus-insurance-policy-document.pdf, at page 3; *Diplomat American Insurance Policy Document*, https://www.visitorscoverage.com/policydoc/diplomat-america-insurance-policy-document.pdf, at page 7-8; Inbound Immigrant Insurance Policy Document https://www.visitorscoverage.com/policydoc/inbound-immigrant-insurance-policy-document.pdf, at page 12.

Second, although Appellants suggest that visa applicants can easily seek reconsideration of a visa denial within a year, they do not acknowledge that "prolonged separation from family members" is not "compensable with monetary damages." *Hawai'i v. Trump*, 859 F.3d 741, 782 (9th Cir. 2017); *see also Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 629 (D. Md. 2017) (holding that "[t]he absence of a family member cannot be cured through a later payment of money damages"). Nor do Appellants address Plaintiffs, like John Doe #1, whose family members have approved I-601A waivers; these family members must either remain undocumented in the United States and risk being detained or placed into removal proceedings, or travel to their consular interviews and risk being denied a visa under the Proclamation. A visa denial would result in an "automatic revocation" of their I-601A waivers, ER 84, stranding these family members abroad with no definite opportunity to reunite with their sponsors in the United States. SER 78-82; SER 312-313. As the district court emphasized, "[t]hese are immigrant applicants for whom it has already been determined it would be an 'extreme hardship' on family members for them to be separated." ER 36.[23]

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[23] *See Matter of Cervantes-Gonzalez*, 22I. & N. Dec. 560, 565 (BIA 1999), *aff'd*, *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001) ("extreme hardship" is hardship that exceeds that which is usual or expeted); *see also* USCIS Policy Manual Vol. 9, part b, chapter 2 (https://www.uscis.gov/policy-manual/volume-9-part-b-chapter-2).

Appellants also challenge the district court's findings as to Latino Network, contending that it is unclear how the Proclamation would contravene the organization's mission. Br. 50-51. Latino Network's mission is to "educate and empower Multnomah County Latinos to achieve physical and mental health, safe housing, sustainable financial stability, and social support." SER 192-205; ER 282. As the district court properly recognized, the Proclamation had already forced Latino Network to put several programs on hold; to devote up to 15 percent of paid staff members' weekly time to respond to the Proclamation; and to allocate almost $14,000—money not in Latino Network's existing budget—to train staff and conduct the necessary research to respond to community concerns. ER 11. The district court did not abuse its discretion in finding that Latino Network has standing and that the Proclamation would force the organization "to continue to divert resources and abandon a significant portion of its core mission." ER 37.

C. The District Court Did Not Err in Finding That the Balance of Harms and the Public Interest Factors Tip Sharply in Favor of a Preliminary Injunction

Appellants argue that the irreparable harm to Plaintiffs is outweighed by their own abstract institutional injuries, but this position finds scant support in the case law and no support in the record. Appellants rely on in-chambers decisions in cases concerning executive actions *commanded* by statute. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1352 (1977) (Rehnquist, J., in

chambers); *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd.*). Here, the government does not and cannot suggest that there is any statutory command: indeed, the Proclamation *contravenes* multiple statutory provisions already legislated by Congress. As the district court observed, "[w]hen the alleged action by the government violates federal law, the public interest factor generally weighs in favor of the plaintiff." ER 37 (citing cases).

Appellants' invocation of uncompensated care costs and unsupported assertions of alleged burdens on emergency room services do not change this balance. The district court correctly found that "[t]here is no evidence in the record that immediate implementation of the Proclamation is necessary to help the 'national interest' of reducing uncompensated healthcare costs," not least because the Proclamation says nothing about "whether [legal immigrants] make any meaningful contribution to the $35 billion in uncompensated costs" the Proclamation references. ER 42. Evidence highlighted by the district court indicates that "recent uninsured immigrants use less than one-tenth of one percent (0.06 percent) of total American medical resources and only 0.08 percent of emergency room services"—figures that "would be even lower" if "only *legal* uninsured immigrants were considered (the group included in the Proclamation)." ER 9.

The evidence also demonstrates that many of the Proclamation's "approved" plans are not subject to the ACA's consumer protections and adequate coverage requirements, and "will result in the immigrants being left underinsured," ER 40—a problem that will *increase*, not reduce, the burden on emergency room services and uncompensated care costs. SER 227-228 ¶ 17-18, SER 184-185 ¶ 31-34, SER 170-172 ¶ 6-16. The government's own data show that non-comprehensive plans and self-insurance do not reduce uncompensated care costs; rather, improved access to comprehensive coverage through subsidized, ACA-compliant plans and expanded access to Medicaid coverage has been proven to decrease uncompensated care costs.[24] That is why Congress made assistance immediately available to immigrants under the ACA for enrolling in comprehensive healthcare plans.

Appellants have not offered any evidence to show why their interest in enforcing the Proclamation pending resolution on the merits outweighs the

[24] *See, e.g.*, Dep't of Health & Hum. Servs., Assistant Secretary for Planning & Evaluation (ASPE), "The Economic Impacts of Medicaid Expansion, Uncompensated Care Costs and the Affordable Care Act, ASPE Issue Brief (Mar. 2015), *available at* https://aspe.hhs.gov/economic-impacts-medicaid-expansion-uncompensated-care-costs-and-affordable-care-act-aspe-issue-brief-march-2015 (addressing insurance expansion, hospital uncompensated care, and the ACA, and the economic impact of the ACA's Medicaid expansion); *id.* ("By greatly reducing the numbers of Americans who are uninsured through the establishment of the Health Insurance Marketplace and by facilitating States' expansions of Medicaid, the Affordable Care Act has reduced hospitals' uncompensated care costs.").

concrete and significant irreparable harms the district court found the Proclamation would inflict on "Plaintiffs, putative class members, state and local governments, and *amici*." ER 38-42; ECF 71, 73. The District Court did not abuse its discretion in finding that the balance of harms and the public interest tipped sharply in favor of a preliminary injunction.

III. The District Court Did Not Abuse Its Discretion in Determining The Scope of the Injunction

The district court was within its discretion to enjoin the Proclamation in its entirety based on the record and circumstances of this case. *See TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 829 (9th Cir. 2011) ("The scope of an injunction is within the broad discretion of the district court."); *see also United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 358 n.8 (1961) ("Equitable remedies . . . are distinguished by their flexibility [and] their adaptability to circumstances.") (internal quotation marks omitted).

The Proclamation "is anticipated to affect approximately 60 percent of all immigrant visa applicants." ER 34, 38. The individual Plaintiffs themselves reside in five different states and seek to represent a class of similarly situated individuals who face the same irreparable harm of potentially indefinite family separation. ER 12-15; ER 35-37; ER 42-46. The record details harm that extends far beyond the individual Plaintiffs and even beyond the putative class, including harms to additional nonprofit organizations and the communities they serve, as well as

harms to multiple states, their economies, important employment sectors, and their health insurance exchanges. ER 38-42; ECF 73; ECF 88.

In similar circumstances, the Supreme Court fashioned an injunction that extended not only to named plaintiffs but others similarly situated. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017). [25] The district court did not abuse its discretion in adopting the same approach based on the record here. *Compare* ER 38-42, 46 (considering an extensive record of harms beyond the named Plaintiffs) *with E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1030 (9th Cir. 2019) (limiting the scope of injunction granted by the district court "[b]ased on the briefing and limited record before us"); *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) ("[W]hile the record before the district court was voluminous on the harm to the plaintiffs, it was not developed as to the economic impact on other states."); *City & Cty. of San Francisco*, 897 F.3d at 1225 ("[T]he record is not sufficiently developed on the nationwide impact of the Executive Order.").

[25] Courts have long been willing to issue injunctive relief that benefits non-parties so long as there is a plaintiff who satisfies the Article III requirements for bringing the "case or controversy" before the district court. *See, e.g.*, Sohoni, *The Lost History of the Universal Injunction*, 133 Harv. L Rev. 920 (January 2020); Frost, *In Defense of Nationwide Injunctions*, 93 NYU L. Rev. 1065 (November 2018).

The "flexibility" of the district court's equitable remedy is particularly appropriate here given the nature of the harm that the Proclamation threatens to the putative class. *E.I. du Pont,* 366 U.S. at 358 n.8. The district court considered alternatives but found that an injunction limited in geographic scope or otherwise limited to the named Plaintiffs and the clients of Latino Network "would create significant administrative difficulties," "would lead to uneven enforcement," and "may also lead to unintended consequences for the State of Oregon." ER 46. As the district court noted, it is "contrary to the purposes behind class actions and preliminary injunctive relief" to force putative class members to suffer the same irreparable harm as the named Plaintiffs "merely because the preliminary injunction had to be litigated in an expedited fashion before class certification could be fully litigated." ER 44-45 (collecting cases); *see also Azar*, 911 F.3d at 582 ("The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward.") (quoting *Int'l Refugee Assistance Project,* 137 S. Ct. 2080, 2087.

Such judgments do not constitute an abuse of discretion, especially where, as here, Appellants do not dispute that the Proclamation would apply to members of the putative class and represents a significant disruption of the nation's immigration system. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016) (affirming preliminary injunction granting classwide relief to a putative class);

O.B. v. Norwood, 170 F. Supp. 3d 1186, 1200 (N.D. Ill. 2016) ("The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons.") (quotation marks and citation omitted), *aff'd*, 838 F.3d 837 (7th Cir. 2016).

The district court also expressly stated that it will be able to "revisit such relief after the Plaintiffs' motion for class certification has been decided." ER 46. It set a discovery and briefing schedule that will enable the Court to take Plaintiffs' class certification motion under advisement on March 9, 2020. ECF No. 117. None of Appellants' cases hold that granting such flexible equitable relief is contrary to law, and it is premature for the Appellants to suggest that the district court abused its discretion here or lacks the capacity to refine the scope of relief after deciding Plaintiffs' class certification motion in March. The district court's injunction appropriately preserves the status quo by halting a significant change to the nation's current immigration system, and preventing widespread human suffering before the court can consider class certification and the merits of Plaintiffs' claims. *See Golden Gate Rest. Ass'n v. City and Cty. of S.F.*, 512 F.3d 1112, 1116 (9th Cir. 2008) ("The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the

merits.") (quoting *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974)).

The district court's interim equitable relief addresses not only the "violation established," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), but also the "systemwide impact" the Proclamation threatens, *Lewis v. Casey*, 518 U.S. 343, 359 (1996). A preliminary injunction limited only to the named Plaintiffs would not "remedy the specific harm alleged." *E. Bay Sanctuary Covenant*, 934 F.3d at 1029. That harm is a disruption of this nation's immigration and healthcare systems that would inflict irreparable harm on thousands of citizens and lawful permanent residents. The district court's injunction appropriately balances the equities while the litigation moves forward and until the district court can decide Plaintiffs' class certification motion.

Appellants claim that the district court's injunction will have a negative effect on "percolation," depriving other parties of the right to litigate in other forums and depriving appellate courts of a wider range of perspectives. Br. at 64. But countless cases prove otherwise. For instance, notwithstanding the district court's preliminary injunction in this case, a second lawsuit challenging the Proclamation was filed in in the Southern District of New York three weeks later. *Make the Road New York v. Pompeo*, Case No. 1:19-cv-11633, filed Dec. 19, 2019. A motion for preliminary injunction was filed in that case on January 21,

2020, placing the legality of the Proclamation before a court in the Second Circuit. *Id.* at Dkt. 44.[26] The recent DACA cases also demonstrate that the issuance of a nationwide injunction has no adverse impact on percolation or how courts in other jurisdictions consider the same issues or tailor relief. *See generally Casa de Maryland v. DHS*, 924 F.3d 684 (4th Cir. 2019); *Regents of the Univ. of Cal. v. U.S. Dept. of Homeland Security*, 908 F.3d 476 (9th Cir. 2018); *N.A.A.C.P. v. Trump*, 298 F. Supp. 3d 209 (D.D.C 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018).

Finally, the district court's injunction promotes the interest of uniformity in immigration law. *Hawai'i v. Trump*, 878 F.3d at 701, *rev'd on other grounds*, 138 S. Ct. 2392 (2018). It is also consistent with the basic separation of powers principle that courts may "strike down provisions of law" that "undermine the authority and independence of one or another coordinate Branch." *Mistretta v. United States*, 488 U.S. 361, 382 (1989). [27] Here, the particular circumstances of

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[26] *Compare also City of Chi. v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. Sept. 15, 2017) (granting nationwide preliminary injunction on "sanctuary city" policy conditioning federal funds on compliance with federal immigration law enforcement initiatives) *with* Complaint, *City of L.A. v. Sessions*, No. 2:17-cv-07125 (C.D. Cal. Sept. 29, 2017) (challenging same policy and seeking independent injunctive relief), ECF No.1.

[27] The Constitution created a judicial system that differed from the "king-loving nation" of England. *See Lee v. Kaufman*, 15 F. Cas. 204 (E.D. Va. 1879) (No. 8192), *aff'd*, *U.S. v. Lee*, 106 U.S. 196 (1882). By Constitutional design, American courts must be able to check executive power so that "ambition . . .

this case and ample legal authority confirm the district court did not abuse its discretion in determining the scope of the preliminary injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request that this Court affirm the district court's order preliminarily enjoining implementation of the Proclamation.

Dated: January 30, 2020

Respectfully submitted,

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counteracts ambition." The Federalist No. 51 at 322 (James Madison) (Clinton Rossiter ed., 1961). It is the federal courts' duty "to declare all acts contrary to the manifest tenor of the Constitution void." The Federalist No. 78.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiffs-Appellees state that they are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)(7)(C) & CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached answering brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,844 words.

/s/ Naomi A. Igra
Counsel for Plaintiffs-Appellees
January 30, 2020

CERTIFICATE OF SERVICE

I, Naomi A. Igra, a member of the Bar of this Court, hereby certify that on January 30, 2020, I electronically filed the foregoing "Brief of Plaintiffs-Appellees" with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Naomi A. Igra

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